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IN THE

Supreme Court of the United States

October Term—1951

No. 236

LOUIS WEBER,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

HOWARD W. AMELI,
Attorney for Petitioner.

JAMES F. RYAN,
with him on the Brief.

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IN THE

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No. .....

LOUIS WEBER,

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—v.—

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of The Supreme Court of the United States:

Petitioner, Louis Weber, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on July 15, 1952 (p. 166).*

Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1) Rule 37 (b) (2) and Rule 45 (a) of the Federal Rules of Criminal Procedure. By order of Mr.

* "p" references are to pages in "supplement" to the Transcript of Record. "f" references are to folios in the Transcript of Record.

Justice Jackson dated July 3, 1952, petitioner's time to file this application was extended to August 4, 1952 (p. 167).

Opinion Below

There was no opinion in the District Court. The opinion of the Court of Appeals has not yet been officially reported. It appears on pages 162-165 of the Supplement to Transcript of Record.

Statement of Matters Involved

The judgment of the Court of Appeals sought to be reviewed, affirmed petitioner's conviction of a violation of the perjury statute (18 U. S. C. Sec. 1621) in testifying falsely to a matter before a Sub-Committee of the United States Senate's Special Committee to Investigate whether Organized Crime utilized the facilities of Interstate Commerce.

On March 16, 1951 the petitioner was asked the following question:

> "Mr. Chairman: You told us before you never did know Mr. Moran, when you were here before. Here is Mr. Moran. Do you know him?
> Mr. Weber: No sir."

This answer alleged in the indictment to be knowingly false, formed the only count in the indictment.

Upon the verdict of guilty, the Court imposed a maximum sentence of 5 years imprisonment and a fine of $2000.

During the course of the trial the prosecution presented 8 witnesses to the trial jury. Petitioner's counsel asked each of the said eight witnesses whether he had testified before the Grand Jury. Only three had so testified, namely,

Maxwell Lipton, a stenographer for the Kefauver Committee in closed session on February 14, 1951 and in the open session of March 16, 1951; Gerard M. Martin and Thomas R. Daly, members of the New York City Fire Department.

Maxwell Lipton testified that on March 16, 1951 petitioner took the oath and testified that he did not know Mr. Moran. Gerard Martin and Thomas R. Daly testified that petitioner came to the office of the Fire Commissioner to see Mr. Moran.

Through these three witnesses, three of the elements of the crime of perjury were proved, namely, the petitioner's oath, petitioner's testimony and the falsity of the said testimony.

Among the other five witnesses who did not appear before the Grand Jury were Arnold Schubert and Rudolph Halley. Arnold Schubert testified that he was a stenographer and from his stenographic notes testified that on March 16, 1951 Senator Kefauver appointed himself as a committee of one to conduct the hearing, swear witnesses and take testimony.

This evidence proved the 4th element of the crime of perjury, namely "a competent tribunal with the power to administer an oath."

This evidence was not presented to the Grand Jury.

Rudolph Halley, counsel for the Kefauver Committee, testified that petitioner was called as a witness before the committee to ascertain the association of Moran with criminals and whether the Mafia and large criminal syndicates dominated the policy racket.

This evidence proved the 5th element of the crime of perjury, namely, the materiality of the false testimony.

This evidence was not presented to the Grand Jury.

So that it easily discernable from the minutes of the trial, that the Grand Jury did not receive sufficient evidence upon which the indictment was predicated.

In order to protect the rights of petitioner, counsel made the preliminary motion to inspect the minutes of the Grand Jury and/or to dismiss the indictment upon the ground that the Grand Jury did not receive sufficient evidence upon which the indictment was found. This motion was denied. During trial, petitioner's counsel offered the Grand Jury minutes for identification. This offer was denied. At the close of the Government's case and on the whole case, motions were made to dismiss the indictment on the same ground. All motions were denied.

On the day this appeal was argued in the Court of Appeals, petitioner's counsel brought a motion to be heard with the Appeal, wherein petitioner moved the Court of Appeals for an order directing the District Attorney to produce the Grand Jury minutes for the Court of Appeals to read, so that the question of the sufficiency of the evidence before the Grand Jury could be properly decided. This motion was denied.

All these motions called for the reading of the Grand Jury minutes. By the Court's failure to read the minutes, the petitioner's liberty was taken away without due process of law.

The Court of Appeals further held that the testimony of the petitioner was material. The alleged false testimony had to be material to either one of two evidentiary facts introduced into evidence by the prosecution, namely 1st, the purpose of the Senate Committee Investigation which was, whether organized crime utilized the facilities of interstate commerce, or 2nd, the purpose as testified to by the witness Rudolph Halley, namely, to ascertain the association of Mr. Moran with criminals and that the committee had information, but not proof, that the Mafia and

large criminal syndicates controlled and dominated the policy rackets.

The decision apparently eliminates the question of materiality to the purpose of the Senate Resolution itself, but holds the false testimony was material to the purpose as testified to by Rudolph Halley.

Such a holding involves the question of the power and authority of the Senate Resolution. Does the Resolution speak for itself? Can the witness Mr. Halley testify to a purpose not expressly provided in the Resolution? If such testimony of the said purpose be admissible, can such testimony, without a scintilla of evidence in support thereof, be sufficient by itself to hold the false answer was material.

The trial jury was picked during the morning and completed shortly after noon. The jury was excused until the following morning. That evening and the next morning several New York Newspapers published the petitioner's criminal record and a scandalous cartoon. The following morning and before any testimony was taken, trial counsel for petitioner moved to withdraw a juror and declare a mistrial. All the objectionable newspaper articles and cartoon were introduced in evidence in support of the motion. The motion was denied. The decision of the Court of Appeals held that "the trial court's only remedies were either to caution the jury not to be influenced by anything seen in the newspapers or to declare a mistrial. Here the court gave such a caution."

The record is absolutely void of any such caution. The word "newspaper" or reading any account in any form was never mentioned during the admonition to the jury on the previous day, and the record clearly demonstrates that the trial court, after hearing argument and reviewing the objectionable articles and scandalous cartoon, immediately ascended the bench, started taking testimony and

never advised, cautioned or admonished the jury about being influenced by anything seen in the newspapers.

Such a holding involves the question of a fair and impartial trial in accordance with the 6th Amendment of the Constitution of the United States.

Questions Presented

1. Did the trial court err in refusing to read the minutes of the Grand Jury when petitioner's counsel proved during the trial that only 3 out of 5 elements of the crime of perjury had been presented to the Grand Jury, thereby putting the trial court on notice that there was a violation of the "indictment clause" of the 5th Amendment.

2. Did the Court of Appeals err in refusing to grant the motion made by petitioner's counsel to direct the District Attorney to present the Grand Jury minutes to the Court of Appeals so that the Court of Appeals could read the said minutes and properly decide whether the indictment was defective and in violation of the "indictment clause" of the 5th Amendment, and further, did the denial of the said motion by the Court of Appeals deprive the petitioner of his liberty without due process of law in further violation of such clause in the 5th Amendment.

3. Did the Court of Appeals err in holding that the trial court cautioned the jury "not to be influenced by anything seen in the newspapers" when in truth and in fact the trial judge never mentioned "reading newspapers" and further, after hearing motions and seeing the objectionable articles and scandalous cartoon, ascended the bench, started the trial without cautioning the jury to disregard anything seen or read in the newspapers, thereby violating the 6th Amendment of the Constitution.

4. Did the Court of Appeals err in holding the false answer was material to the matter being investigated by the Senate Sub-Committee and within the scope and designated power of Senate Resolution #S-202.

Reasons for Granting Writ

1. To review the decision of the Court of Appeals in refusing to grant the motion to direct the District Attorney to submit the Grand Jury minutes to said Court, so that the said minutes could be examined and the question of a violation of the "indictment" clause of the 5th Amendment could be properly decided, and further, by said refusal to determine whether the Court of Appeals violated the further clause of the 5th Amendment by depriving the petitioner of his liberty without due process of law. *McKinney* v. *U. S.*, 199 F. 25, 31.

2. To review the decision of the Court of Appeals which is in conflict with the same Court's decision in *U. S.* v. *Alper*, 156 F. 2nd 222, 226.

3. To review the decision of the Court of Appeals in relation to the new Federal Rules of Criminal Procedure namely, 6 (e) thereof. There has been no decision from this Honorable Court on the question involving the duty of the lower courts to read the minutes in order to properly decide the question of violation of the 5th Amendment. Such a duty thereby eliminating all former decisions of considering form above substance, and further eliminating speculation and conjecture as to whether the 5th Amendment has been violated.

4. This case involves principles of constitutional rights and due process, the settlement of which is of importance to the public. *Layne & Bowler Corp.* v. *Western Well Workers Inc.*, 261 U. S. 387, 393.

5. To review the decision of the Court of Appeals in holding that the false answer was material to the matter under investigation and within the power and authority of a Congressional Committee. *Sinclair* v. *U. S.*, 279 U. S. 263; *Kilbourne* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135, 173.

6. To review the Court of Appeals decision which is in conflict with *U. S.* v. *Crowley*, 194 U. S. 461. The indictment herein was obtained in the District Court for the Southern District of New York. *U. S.* v. *Crowley, supra*, held, in the absence of Federal enactments, State statutes prevail. There are no Federal enactments governing the evidence before a Federal Grand Jury. The State of New York has statutes governing the evidence before the Grand Jury namely, Secs. 526 and 528 of the Code of Criminal Procedure.

7. To review the Court of Appeals decision which deprives citizens of the same state of equal protection of their constitutional rights in that it is the established law of the State of New York to impose upon the trial court the duty to read the minutes of the Grand Jury to determine whether or not there is a violation of the petitioner's constitutional rights. *People* v. *Joslin*, 129 Misc. 790; *People* v. *Kresel*, 141 Misc. 593; *People* v. *Glenn*, 173 N. Y. 395; *People* v. *Nitzberg*, 289 N. Y. 523.

Important questions in the administration of criminal justice rendering it appropriate for this Court to grant certiorari are raised by the petition as noted in Subject Matter Involved and Questions Presented, *supra*. *Bollenbach* v. *U. S.*, 326 U. S. 607, 608.

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for

the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceeding in said Court herein, being the case numbered and entitled in its docket as "United States of America v. Louis Weber", App. No. 239, Docket No. 22323, October Term 1951, and that the judgment of said Court be reviewed by this Court, and for such other and further relief as to this Court may seem proper.

Dated, July 29th, 1952.

LOUIS WEBER,
Petitioner.

by HOWARD W. AMELI,
Attorney for Petitioner.

JAMES F. RYAN,
with him on the Petition.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, July 29th, 1952.

HOWARD W. AMELI,
Attorney for Petitioner and a member of the Bar of this Court.

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BRIEF FOR PETITIONER

Statutes Involved

The Federal Statutes involved are 18 U. S. Code Sec. 1621 and Senate Resolution 202 (81st Congress, 2nd Session) Ex. 3 (ff. 412-421).

Statement of Facts

There was one count in the Indictment charging a violation of Sec. 1621 (perjury) in that petitioner, while a witness on March 16, 1951, before a sub-committee of the Special Senate Committee to investigate whether Organized Crime utilized the facilities of Interstate Commerce, was asked the following question.

> "Mr. Chairman: You told us before you never did know Mr. Moran, when you were here before. Here is Mr. Moran. Do you know him?
>
> Mr. Weber: No Sir."

and that the answer was false with respect to material matter under investigation (ff. 8-12).

In order to eliminate any claim by the prosecution, that petitioner waived his rights to an inspection of the Grand Jury Minutes, petitioner moved the District Court for inspection, or in the alternative, to dismiss the Indictment on the ground that the Grand Jury did not receive sufficient evidence upon which to predicate the Indictment (ff. 13-18). This motion was denied (ff. 454-462).

Petitioner's counsel was familiar with the District Court's attitude toward such a motion, and the prosecution's cry of a fishing expedition, so in order to overcome these barriers, trial counsel employed the simple method of asking each witness presented by the prosecution during trial, "Did you testify before the Grand Jury?"

By the process of elimination, five out of eight witnesses did not testify before the Grand Jury (ff. 155, 172, 182, 267, 280).

The three witnesses who testified before the Grand Jury were Maxwell Lipton (114), Gerard Martin (230) and Thomas Daly (250). In an analysis and an evaluation of these three witnesses' testimony, and all the documentary evidence adduced on trial, three out of the five elements of the crime of perjury were proved before the Grand Jury namely, that petitioner was sworn (80); that petitioner testified (74-114) and that petitioner's testimony was false (217, 247).

The other two elements of the crime of perjury namely, a competent tribunal with the power to administer an oath, and the materiality of the false testimony was proved on trial by the testimony of Arnold Schubert (181) and Rudolph Halley (148-152). These two witnesses did not testify before the Grand Jury (155, 182). So that it is easily discernible that the Grand Jury did not receive any evidence on two elements of the crime of perjury.

During the trial, counsel offered the Grand Jury Minutes for identification (200) and that motion was denied (300).

At the end of the prosecution's case and on the whole case, petitioner moved to dismiss the Indictment upon the ground that the Grand Jury had received insufficient evidence upon which the Indictment was predicated (303-4).

Counsel moved for the withdrawal of a juror, and the declaration of a mistrial, and in support of said motion introduced objectionable newspaper articles and a scandalous cartoon. This motion was made before any evidence was taken, and denied (56-69).

On the argument before the Court of Appeals counsel brought on a motion before the said Court, requesting an order directing the District Attorney to submit the Grand Jury Minutes to the Court of Appeals, so that the said Court of Appeals could read the said Minutes and properly decide the question of a violation of the "indictment clause" in the 5th Amendment to the United States Constitution (App. A to the brief). This motion was denied (p. 164).

ARGUMENT

POINT I

The Grand Jury found the indictment on evidence of three out of five elements of the crime of perjury and was found in violation of petitioner's constitutional rights. The decision of the Court of Appeals is in conflict with a decision from the same Court. The said decision is in conflict with a decision from the Supreme Court of the United States. The said decision violates the petitioner's constitutional right of the equal protection of the laws of the State of New York.

As previously stated, petitioner's counsel employed the aforesaid method to overcome the barriers and planned to attack the Indictment under the exceptions as stated in *U. S.* v. *Farrington*, 5 F. 343, wherein the Court said, at page 348:

> "It is not the province of the Court to sit in review of the investigation of the grand jury as upon the review of a trial when error is alleged, but in extreme cases when the Court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment result from prejudice, or was found in wilfull disregard of the rights of the accused, the Court should interfere and quash the indictment."

The case at bar falls within the term "extreme cases" because the method employed in testing the sufficiency of the evidence upon which the Indictment was predicated, has never been employed in any recorded case in Federal Procedure.

The case at bar falls within the expression "when the court can see that the finding of a Grand Jury is based upon such utterly insufficient evidence", because Arnold Schubert, the Committee's stenographer, and the only probable person to testify from his notes, did not testify before the Grand Jury (182) and the said Grand Jury did not receive any evidence on the element of the crime of perjury namely, competent tribunal to administer an oath. Further, by the opinion of the Court of Appeals Rudolph Halley's testimony was the only evidence in the trial whereby the petitioner's false statement was held material (p. 164). This testimony, on the other element of the crime of perjury, was not presented to the Grand Jury (155). So that the Court could easily see that the finding of the Grand Jury was based upon utterly insufficient evidence.

The case at bar falls within the expression "the indictment • • • was found in wilfull disregard of the rights of the accused" because the District Court and the Court of Appeals failed to read the Grand Jury Minutes, so that the motions could be properly decided. By the denial of the motion before the Court of Appeals, and their failure to read the Minutes, the opinion had to be written in the subjunctive mood (p. 163) and the question remained clouded in doubt. As long as petitioner lives he will probably feel, whether justifiably or not, that the result might have been otherwise if the minutes were read, and his liberty would not have been taken without due process.

Taking the law of the case as charged by the Court in instruction #6 (332-335) there are six (6) elements comprising the crime of perjury, and if the government fails to prove any one or more of these elements beyond a reasonable doubt, the petitioner must be acquitted (335-336).

It is the contention of the petitioner that said law equally applies to the evidence adduced in the Grand Jury. If the government fails to prove any one or more of these ele-

ments beyond a reasonable doubt, no true bill can be returned.

In *U. S.* v. *Rubin*, 218 F. 245, 248, the Court said:

> "The complete protection of the rights of citizens must necessarily commence and does commence at the inception of any criminal proceeding * * *. These reasons are sufficient to sustain the doctrine that the Grand Jury is forbidden to make an accusation against a person without legal evidence to support it."

In *McKinney* v. *U. S.*, 199 F. 25, 31, Judge Sanborn, in discussing the subject in issue in relation to the 5th and 6th Articles of Amendments to the Constitution of the United States, said:

> "If therefore, his indictment was found without legal evidence and hence in violation of law, and the judgment against him is affirmed and executed, he will be deprived of his liberty and property without due process of law."

In *Re National Window Glass Workers*, 287 F. 219, 224, the Court said, citing *Krippendorf* v. *Hyde*, 110 U. S. 276:

> "It was said that Courts of law have inherent power over their own process to prevent abuse, oppression and injustice. This is fundamental law. Authorities to that effect might be multiplied without limit. It is the basis of holdings that the secrecy of Grand Jury proceedings may be disregarded whenever ends of justice require it, and of the conceded although carefully guarded and seldom exercised rule that an indictment will be quashed if returned by Grand Jury, upon evidence wholly incompetent."

In *U. S.* v. *Byoir*, 58 F. Supp. 273, 275, the Court said:

> "The veil of secrecy may be torn asunder in the interest of justice, and such lifting is within the jurisdiction of the court impanelling the Grand Jury * * *."

In *U. S.* v. *Alper*, 156 F. 2nd, 222, 226, Judge Swan said:

> "After an indictment has been found and the accused apprehended, the veil of secrecy surrounding Grand Jury proceeding may safely be lifted, where justice so requires, citing Metzler v. U. S., 64 F. 2nd, 203, 206; U. S. v. Pearlman, 247 F. 158, 160. * * * When the testimony before the Grand Jury is in small enough compass to make any contradiction between it and the witness' trial testimony readily discoverable, it is a tolerable duty to impose upon the judge an examination of the minutes."

If the reading of the minutes to prove a contradiction in testimony is required, then the reading of the minutes to discover the lack of evidence on one or more of the elements of a crime and thereby obtaining an indictment in violation of the petitioner's constitutional rights, is of greater importance. It is a duty the Court must assume.

In the interest of justice and the guarantee that a citizen cannot be brought to trial unless it is done in accordance with the law, the Grand Jury minutes herein should have been examined by the Court of Appeals or by this Honorable Court to determine whether there was wilfull disregard of the rights of the petitioner.

In *U. S.* v. *Swift*, 186 F. 1002, 1018, it was held,

> "The cases are uniform to the effect that, except in those States in which, by statute, indictments are required to be returned on 'legal' or 'competent' evidence, the courts will not review the evidence

received by a grand jury for the purpose of passing upon its competency."

The State of New York in which the indictment herein was found, has two statutes governing the evidence in the Grand Jury, namely, Secs. 256 and 258 of the Code of Criminal Procedure.

Sec. 256 reads:

"The Grand Jury can receive none but legal evidence."

Sec. 258 reads:

"The Grand Jury ought to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."

The petitioner finds no Federal Enactments comparable to said Secs. 256 and 258, so that the exception in the opinion in *U. S.* v. *Swift, supra,* is evident in this case.

The State controls the practice in the absence of federal enactment.

Crowley v. *U. S.,* 194 U. S. 461.

The principle announced in that case bears upon the procedure in forming the Grand Jury. The same principle involving aforesaid State statutes should and does equally apply in protecting the rights of a petitioner before the Grand Jury.

In *Erie R.R. Co.* v. *Thompkins,* 304 U. S. 65, Mr. Justice Brandeis said, at page 79:

"The authority and only authority is the State, and if that be so, the voice adopted by the State as

its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."

The principle announced by Mr. Justice Brandeis, although used in a civil case, is broad enough to encompass the question presented in this criminal case.

It is a well established practice in the State of New York, that on a motion to inspect the Grand Jury minutes, especially where the accused has been deprived of a preliminary hearing before a Magistrate (the petitioner was deprived of such a hearing before a Commissioner), the Court will read the Grand Jury minutes.

In *People* v. *Joslin*, 129 Misc. 790, 792, the Court said:

> "The minutes of the Grand Jury were handed to the court on the argument of the motion and a careful inspection of the minutes by the court * * *."

In *People* v. *Kresel*, 141 Misc. 593, 600, the Court said:

> "* * * and by an examination of the minutes of the Grand Jury handed to me after argument * * *"

Upon these inspections by the Court, numerous decisions have been written regarding the insufficiency of the evidence before the Grand Jury upon which the indictment was found.

In *People* v. *Glenn*, 173 N. Y. 395, the Court said:

> "An indictment cannot stand if it is founded upon * * * insufficient evidence."

That case has been followed by many decisions down to *People* v. *Nitzberg*, 289 N. Y. 523, and on page 536, Mr. Justice Lehman said:

> "The defendant has been held and tried upon an indictment found without sufficient evidence * * *.

> We repeat what we have so often said, an accused may not be punished until he has been proven guilty, in accordance with the law."

The contrast in the decisions of the Court of the State of New York and of the Federal Court sitting in the State of New York demonstrates that the several citizens of the State of New York have not equal protection of their constitutional rights in the Federal Court.

There is no Federal enactment on this subject. The State of New York has Statutes governing and the Court of Appeals of the State of New York has uttered the last word.

Prior to the adoption of Rule 6 (e) Federal Rules of Criminal Procedure in 1946, the inspection of Grand Jury minutes were granted in the rarest occasions. It had been a custom among District Attorneys' offices never to transcribe the stenographic notes of the Grand Jury.

For many years and up to the adoption of the said rule such motions were decided upon form and not substance. Again in the rarest of occasions the District Court might read the minutes.

As a result of this attitude, and course of conduct, there have been countless violations of the 5th Amendment. In fact, the Court of Appeals for the 2nd Circuit has gone so far in *U. S.* v. *Remington,* 191 F. 2nd at page 252, to say:

> "* * * an indictment is, after all, no more than an accusation."

That cannot be the law although this Court of Appeals has finally set down in a judicial opinion the attitude and course of conduct above mentioned.

That is the language used by the trial court to impress upon a jury of laymen that the indictment has no proba-

tive value. It cannot be the law that the Court of Appeals wants the members of the bar to accept. If it be the law it is well to bring the matter to this Honorable Court, and settle forever to the enlightenment of the courts, bar and public, what the word "indictment" means in the 5th Amendment of the Constitution.

If that be the law, the "indictment clause" of the 5th Amendment has no place in the Constitution of the United States. If that be the law, substitute the words "an accusation by the District Attorney" in place and stead of the word "indictment." Then the decision in *U. S.* v. *Remington, supra,* would comply with the amended constitution. If that be the law, what becomes of the great treatises on Grand Juries written by the great text writers from Blackstone down to date, and further, the great opinions by the Supreme Court of the United States and all the Supreme Courts of the 48 States, wherein it was and is preached, taught and decreed, that the Grand Jury is the bulwark against oppression.

If the language used in *U. S.* v. *Remington, supra,* be the law of the land, all these great texts, the great decisions and the Grand Jury system can be discarded and abolished.

That cannot be the law. The word "indictment" is generic. It means every act and action from and through the formation of the Grand Jury through every process and proceeding used until a true bill be found. If any part thereof during the formation, process or proceeding is violated then the 5th Amendment of the United States has been violated.

From the situation developed in the case at bar, the said Court of Appeals has taken the attitude as expressed in *U. S.* v. *Remington, supra,* and has deliberately refused even to read the minutes of the Grand Jury in order to decide the question. As a result of this attitude the said

Court of Appeals was compelled to use the subjunctive mood in its opinion. The mood expressing doubt.

> "Proof • • • *may have been made* by exhibits or by other witnesses" (p. 163).

There can be no room for speculation, surmise, conjecture or guess or any form of doubt when the absolute truth is at hand. A citizen cannot be guessed into jail. The absolute truth was at hand in this case because petitioner's counsel made the motion in the Court of Appeals to direct the District Attorney to submit the Grand Jury minutes to the Court (App. Brief A). The reading of the minutes would establish the truth and eliminate any doubt and the use of the subjunctive mood in its decision.

In denying the motion (p. 164) the Court of Appeals deliberately turned its back on this petitioner, and such action will follow to every citizen. It was a tolerable duty to impose upon the District Court or the Court of Appeals to read the Grand Jury minutes. If there be no other witnesses or no other exhibits, the indictment is defective.

The denial of the motion deprived petitioner of his liberty without due process of law and the decision on the motion is in conflict with *U. S.* v. *Alper, supra.*

In *U. S.* v. *Wells*, 163 F. 313, the Court, at page 325, after citing a statement made by Mr. Justice Field to a Grand Jury (2 Sawy. 668) said:

> "This learned judge observed that the grand jury was to be regarded as standing against 'oppressions of power, violence of malice, and the intemperance of prejudice.'"

In *Hoffman* v. *U. S.*, 341 U. S. 479, 485, Mr. Justice Clarke said:

> "The most valuable function of the grand jury (has been) not only to examine into the commission

of crime, but to stand between the prosecutor and the accused."

The Grand Jury should have followed those words of wisdom. The Grand Jury is the bulwark against oppressions. It is customary that the Grand Jury take the advice of the District Attorney on the questions of law, as to whether the evidence submitted proved a prima facie crime. If the advice were given it was wrong. The Grand Jury should not be used to obtain indictments unless all the elements of the crime for which the petitioner is being investigated has been proved beyond a reasonable doubt. It is the duty of the Court to see that this Grand Jury is conducted in accordance with the law.

It must be borne in mind that most of the cases now on record concerning this point have been decided prior to the adoption of the new rules of procedure particularly 6 (e). There is a marked tendency in recent decisions to tear asunder the veil of secrecy when justice requires. This case only calls for the Court to read the minutes. The petitioner did not want to see or read the minutes of the Grand Jury. In the interest of justice the Court should examine the minutes to determine whether the indictment was obtained in violation of the petitioner's constitutional rights.

In conclusion, there is no evidence before the Grand Jury on more than one of the elements of the crime of perjury. The Grand Jury had no power to find a true bill.

In the *Matter of Case*, 214 N. Y. 199, 203, Judge Cardozo said:

> "It is still the rule, however, even in this Court, that: 'insufficient evidence' is, in the eye of the law, no evidence."

This indictment was predicated upon insufficient evidence in violation of the indictment clause of the 5th Amendment and petitioner's liberty was taken away without due process of law in violation of said clause in the 5th Amendment.

POINT II

The Senate Committee exceeded its designated authority and the false statement was not material to the matter under investigation. The testimony of the purpose for calling petitioner as a witness, unsupported by even a scintilla of evidence, was highly prejudicial, misleading and in violation of the due process of law.

The witness Rudolph Halley was asked:

> "Q. What crimes was the Kefauver Committee investigating at the time Mr. Weber was called as a Witness? A. The Kefauver Committee was not investigating any specific crimes. The Kefauver Committee, pursuant to its authority was investigating the question of whether there existed a serious problem of organized crime in interstate commerce, the relationship between crime and politics and between crime and law enforcement officers throughout the country.
>
> Mr. Ryan: Now, I move to strike his answer out, if your Honor pleases, on the ground that the Resolution that was passed speaks for itself and it calls for no interpretation by any witness.
>
> The Court: Overruled, I don't think he was testifying as to what was in the Resolution, was he?
>
> Mr. Ryan: No, he was testifying what the Resolution means and the Resolution speaks for itself.
>
> The Court: Well, he is an expert. Overruled" (143-145).

There cannot be any question concerning the status of Rudolph Halley. The Court declared he was an expert. As an expert his testimony is restricted. It matters little what the witness testified the Senate Committee was doing, and less what he thought the Committee could do. The Senate Resolution designating the Committee's authority was introduced in evidence (412-421). The Resolution speaks for itself. It is the jury's right to determine what authority the Resolution conferred upon the Committee.

The purpose, power and authority expressed in the Resolution is clear and precise, namely, "whether organized crime utilizes the facilities of interstate commerce."

When the language of a statute is clear and precise it needs no interpretation or construction.

In *U. S.* v. *Hartwell*, 6 Wall 385, the Court said:

> "If the language be clear, it is conclusive. There can be no construction where there is nothing to construct."

The Senate Resolution herein is in the same category as a statute. The language used in the Resolution is clear and precise and needs no interpretation or construction.

When this witness testified that the Kefauver Committee, pursuant to its authority, was investigating the question whether there existed a serious problem of organized crime in interstate commerce, he was within his rights, but when he added the rest of the answer he was invading the province of the jury. Not only was this witness invading the province of the jury, but he was leaving the impression with the jury, that the Committee had further powers than that designated in the said Resolution.

During these days of investigations it is well to bring to the attention of the Court the words of Mr. Justice Clarke in *Hoffman* v. *U. S.*, *supra*, at 485:

> "The signal increased in such litigation emphasizes the continuing necessity that prosecutors and

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During these days of investigations it is well to bring to the attention of the Court the words of Mr. Justice Clarke in *Hoffman* v. *U. S., supra,* at 485:

> "The signal increased in such litigation emphasizes the continuing necessity that prosecutors and

courts alike 'be alert to repress' any abuses of the investigating power involved • • •."

Grand Juries have unlimited authority to investigate any crime and make any inquiry on any subject brought to its attention or within the knowledge of a grand juror, but a Congressional Committee is formed by Resolution for a specific purpose and cannot exceed that purpose.

The Supreme Court of the United States has voiced its opinion on the authority of Congressional Committees in *Sinclair* v. *U. S.*, 279 U. S. 263, 291-2, wherein it said:

> "• • • While the power of inquiry is an essential and appropriate auxiliary to legislative functions it must be exercised with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer *where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry* in accordance with right of people to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs." (Italics ours.)

See *Kilbourne* v. *Thompson*, 103 U. S. 168;
Marshall v. *Gordon*, 243 U. S. 521;
McGrain v. *Daugherty*, 273 U. S. 135, 173.

If the petitioner refused to answer the question herein on the ground that it was not pertinent to the matter under inquiry, he would not be held in contempt. If the question was not pertinent to the matter under inquiry, it was not material.

An opinion or conclusion of an expert (and witness Mr. Halley's answer was his conclusion of the power and authority of the Senate Committee), which is determinative of a vital issue or of ultimate fact in issue ordinarily is excluded as an invasion of the province of the jury.

In *U. S.* v. *Stephens*, 73 F. 2nd 695, 702, discussing expert testimony the Court said:

> "These cases are all for the proposition that the question objected to in the case at bar called for incompetent evidence because the opinion called for the invasion of the province of the jury."

In *Mullins Lumber Co.* v. *William & Brown L & L Co.*, 255 F. 645, 646, the Court held:

> "• • • The jury was qualified to draw the correct inference on the point as to the witness."
>
> "An expert is not permitted to • • • give his opinion as to conclusion from facts within his special skill or knowledge when that opinion assumes the precise question for determination by the jury."

Farris v. *Interstate Circuit*, 116 F. 2nd 409, 412; *U. S.* v. *Block*, 160 F. 2nd 604.

The Resolution herein is comparable to a statute and as such an expert witness cannot construe or interpret it.

> "Expert witness cannot construe or interpret a statute."

Killam v. *Standard Oil Co. of N. Y.*, 248 Mass. 575, 143 N. E. 698.

In *Alabama Power Co.* v. *Williams*, 222 Ala. 75, 130 So. 788, the Court said:

> "It exceeded the range of expert opinion evidence • • • and invaded the province of the jury and called upon the witness to construe and give effect to the National Electric Code."

In *U. S.* v. *Greene*, 146 F. 801, in discussing opinion evidence in the language of a contract, the Court held:

> "It was not the province of an expert or other witness."

An expert witness cannot testify to the power of a corporation under its charter, as the charter speaks for itself.

North Point Cons. Inv. Co. v. *Utah S. L. Con. Co.*, 16 Utah, 246, 52 P. 168;
Thomas v. *West Jersey R. Co.*, 101 U. S. 71.

It is the contention of the petitioner that the Senate Committee exceeded its bounds of power and the jury could so find in reading the Resolution. The testimony of this witness describing the additional matters of inquiry was incompetent, but extremely effective and influential in the determination by the jury. It was prejudicial to the petitioner to allow such testimony to be considered.

In reading the opinion it seems the Court of Appeals held that the false answer was material to the purpose for calling the Petitioner as a witness as testified by Mr. Halley (p. 164). It seems to eliminate any question of materiality between the Senate Resolution and the false statement. However, the argument urged in the Court of Appeals on the latter question is applicable to both questions.

The Kefauver Committee was appointed by the United States Senate Resolution #S-202 to conduct an investigation and report findings whether organized crime utilized the facilities of interstate commerce (412-421).

Pursuant to the authority as designated in said Resolution, the committee held hearings in New York (131) and on the 16th day of March 1951 petitioner testified before the Committee in open session (135-6, 138) and the following testimony was recorded:

"The Chairman: You told us you never did know Mr. Moran, when you were here before. Here is Mr. Moran. Do you know him?
Mr. Weber: No Sir" (74).

These two words are the alleged false testimony and the basis of the indictment. Materiality being one of the elements of the crime of perjury, the alleged false statement must be material to the subject matter of the investigation.

To prove the element of materiality the government put in evidence the said Senate Resolution. Outside of Rudolph Halley's testimony, there is no evidence in this case bearing on the question of materiality of the alleged false statement.

So that on the one hand the record reveals the designated power of the Committee in the said Resolution, namely, whether organized crime utilized the facilities of interstate commerce, and on the other, the petitioner's alleged false statement. The question then presented is whether the petitioner's alleged false statement is material to the matter under investigation.

The answer must come from these two evidentiary facts in this record. If the proposition were put to any Judge not knowing Mr. Moran or petitioner Weber, the first question would be, "Who are Mr. Moran and petitioner Weber?" The only inkling to the identity of Mr. Moran in this record is that he was named as a Deputy Fire Commissioner (153). There is evidence in this record establishing petitioner Weber as a longshoreman (82) and seeking work to scale and paint fire boats (108).

The second question would be, "Is there any evidence in this record proving any connection between these two men or either of them with the matter under investigation?" The answer must be no. There is no evidentiary fact in this record even tending to prove such connection.

As said in *U. S.* v. *Ross,* 92 U. S. 281 at 284:

> "The law requires an open visible connection between the principal and evidentiary facts and the

deduction from them and does not permit a decision to be made on remote inference." *Best on Evidence* 65.

Applying the requirement as stated to this proposition, the principal and evidentiary facts are the designated power in the Senate Resolution and the petitioner's alleged false statement. The decision to be deduced from them is the materiality of the alleged false statement. There is no open visible connection between the evidentiary facts. A decision holding one was material to the other would be made on remote inference.

No facts are relevant (relevancy and materiality are convertible terms) which do not afford a reasonable presumption or inference as to the principal fact in issue, or which do not make more or less probable such a hypothesis. *Wharton Criminal Evidence,* 10 Ed. Vol. 1, Sec. 24.

An inference (or conclusion) can be drawn only from facts in evidence and cannot be based on surmise, speculation, conjecture or guess. It must be reasonably drawn from the facts and supported by the facts it purports to rest and must be made in accordance with correct and common modes of reasoning. C. J. S. 2nd on Evidence (Sec. 1044) cases cited.

As far as this record is concerned, Mr. Moran and petitioner Weber could be Mr. Roe and Mr. Doe. The denial of one by the other is not material because the record does not reveal a scintilla of evidence connecting either of them in any fashion with the matter under investigation.

Without such evidence at least tending to connect these two evidentiary facts, the conclusion or decision must be based on surmise, speculation, conjecture and guess.

The witness Rudolph Halley testified that the Kefauver Committee, pursuant to its authority, was investigating whether organized crime utilized the facilities of interstate

commerce (143-4) and further, that the reason petitioner was called by the Committee was 1st, the relationship between criminals and politics (144), 2nd, to attempt to ascertain the association of Mr. Moran with criminals, and 3rd, that the Committee had information but not proof, that the Mafia and large criminal syndicates controlled and dominated policy rackets (148-151). All testimony was received over objection.

Again there is presented the question whether the evidentiary facts namely, the purpose of calling petitioner as a witness, represented by this witness' testimony is material to the alleged false statement of the petitioner.

The same alleged false answer was also given on February 14, 1951 in a closed executive session (75, 86). The Committee continued to interrogate petitioner at length. There are some 80 questions in this record, and that amount by no means reflects the number of questions petitioner was asked in the said sessions. None of these questions has any bearing or connected in any manner to the purpose as testified to by Mr. Halley.

The witness' statement of the purpose and the petitioner's alleged false statement stand alone in this record. There is no evidence even tending to connect these two evidentiary facts.

The argument applied to the evidentiary facts represented by the power in the Senate Resolution, and the petitioner's alleged false statement must be reiterated and applied to the logic and reason used in determining whether the witness, Mr. Halley's testimony, and the petitioner's alleged false statement are material.

Again the questions must be asked, who is petitioner Weber? What is petitioner Weber's connection with the purpose as testified to by witness Mr. Halley?

There is no open visible connection between the principal and evidentiary facts represented by the purpose as testified by witness Mr. Halley and the petitioner's alleged false statement. The decision, namely, that one is material to the other would have to rest on a remote inference.

The use of logic and common mode of reasoning applicable to the propositions in this case is similar to the use of logic and reasoning in a line of cases involving proximate cause. These cases involve the situation whereby fire is discovered in a building along the railroad tracks shortly after the train has passed the property.

One of the leading cases is *General Ins. Co. of America* v. *Northern Pacific Ry. Co.*, 280 U. S. 72, 50 S. Ct. 44, 74 L. Ed. 172. In that case, the fire was discovered a short time after the train had passed. There was evidence that sparks emitted from the engine stack and that shortly after the train had passed the fire was discovered in the building.

In substance, the Court ruled that in the absence of open visible connection between these two evidentiary facts, using the rules of logic and common modes of reasoning, one could not be the proximate cause of the other.

Along the same line of reasoning the Court held in *Kentwood Lumber Co. Ltd.* v. *Illinois Central R. Co.*, 65 F. 2nd, 663:

> "Inference must be based on probability, not on possibility, and must be reasonably drawn from and supported by facts."

In *General Ins. Co. of America* v. *Northern Pacific Ry. Co., supra,* at page 76, the Court said:

> "No connection is shown between the fire and the passing train except that of sequence."

Nothing is shown in the case at bar except the bald evidentiary facts in both instances.

If evidence were presented in this case that petitioner was a criminal or one of the Mafia or connected with a criminal syndicate controlling the policy racket, as reflected in the purpose as testified by the witness Mr. Halley, then there would be supplied an open visible connection between the two evidentiary facts.

There are no such evidentiary facts and to hold petitioner's false statement is material, would be to indulge in the realm of fancy and speculation.

The District Attorney asked the witness:

> "Q. In what connection was Louis Weber called to testify? A. • • • the Committee was attempting to ascertain the relationships and associations of Commissioner Moran, who had been under investigation for his own associates and relationships with various criminals, • • • second further reason for calling Louis Weber. • • • We had certain specific information, which never has become public, because the Committee did not obtain the proof which it could present, but the information was sufficiently specific to that the Committee was very anxious to questions at length those people who were associated with the policy racket, in order to prove the information we had that the policy racket in New York is dominated by the Mafia and by the large criminal syndicates.
>
> Mr. Ryan: Now, if your Honor pleases, I move to strike it all out on the ground that it is incompetent, irrelevant and immaterial and not binding in any way on Mr. Weber, and it certainly casts an inference on Mr. Weber which is not a real legal thing to do in a courtroom.
>
> The Court: Overruled.
>
> Mr. Ryan: Exception" (148-152).

The witness' testimony was highly prejudicial and extremely inflammatory. It by no means was binding upon the petitioner. If there were any testimony in the case connecting the petitioner with the Mafia, policy racket, racketeers, criminals or large criminal syndicates, there might be some justification for the testimony. However, there is not a scintilla of evidence in the case connecting the petitioner with any of these sort of people, and further, petitioner was never asked a question by the Senate Committee about such association.

This witness' testimony put petitioner's character into evidence as part of the prosecution's case.

> "Unless the defendant in a criminal case puts his character in issue or testifies himself, neither his character or his credibility can be attacked by the prosecution."
>
> *U. S.* v. *Modern Reed & Rattan Co.*, C. C. A. N. Y., 159 F. 2nd 656.

> "The character of the defendant in a criminal case is not in issue, unless the defendant chooses to make it."
>
> *Greer* v. *U. S.*, 245 U. S. 559.

Counsel for petitioner renewed the motion to strike out this witness' testimony after the whole case was in (301-303).

All this testimony of the Mafia, rackets, racketeers, criminals and crime syndicates is irrelevant, immaterial and incompetent and used to create interest, sensation, color and influence upon the jury.

The natural result was prejudicial to the petitioner.

> "Irrelevant facts draw minds of jurors from the point in issue and tend to excite, prejudice and mislead."
>
> *Wharton on Criminal Evidence*, 10th Ed. Vol. 1, Sec. 24 and cases cited.

The Senate Committee exceeded its designated authority. The false answer was not material. The testimony of the purpose for calling petitioner stands alone, was highly prejudicial, misleading and in violation of due process of law.

POINT III

The prejudicial influence outside the courtroom deprived the petitioner of a fair and impartial trial guaranteed by the United States Constitution.

At the close of the morning session of May 14, 1951, the jury was impanelled (45) and excused until the following morning (47). The evening papers of the said day and the following morning editions published articles about the trial and included therein were comments concerning the petitioner as a policy racket king, ex-convict, a record of nine previous arrests ranging from brass knuckles to homicide, and that petitioner had fired shots at Lucky Luciano. In the World Telegram-Sun of the said 14th, there appeared a vicious, defamatory cartoon which was highly prejudicial to the petitioner and could only arouse antagonism toward him.

The following morning, before any testimony was taken in the case, counsel for petitioner made a motion to withdraw a juror and to declare a mistrial on the ground that the articles were highly prejudicial and inflammatory, so that the petitioner could not receive fair and impartial consideration from the jury. Counsel introduced in evidence, in support of the motion, the newspaper articles and the cartoon marked Defendant's Exhibits A, B, C and D (pp. 144-150).

The motion was timely. During the argument counsel for petitioner brought to the attention of the Court *U. S.* v. *Montgomery*, 42 F. 2nd 254 which established a precedent in the District Court under similar conditions.

A fair and impartial trial is the very heart of our judicial system. Through long years of experience courts have been guided, rules promulgated, decisions written, in order that a defendant with a criminal record could be assured of a fair and impartial trial.

The hearings of the Committee in the City of New York were televised, broadcasted and given reams of publicity in newspapers. There was hardly a citizen of the City who did not see, hear or read the accounts of the hearings. The influence outside the court room was tremendous. The pressure upon the public, from which this jury was picked, was overwhelming. Added to that condition, these objectionable articles and scandalous cartoon would be sufficient to bring the situation into the old addage "the straw which broke the camel's back."

Newspaper editors are guilty of outrageous conduct when publishing objectionable articles whereby defendants might be deprived of a fair and impartial trial. Such conduct borders close to contempt of court. Such objectionable articles defeat the ends of justice.

The human mind is still a mystery to man. Even in this advanced age of science, no one knows how thought is created; whether it comes from some external force or from internal inertia. How can the petitioner ever be satisfied that these objectionable articles and the defamatory cartoons didn't leave an indelible imprint on the conscious or subconscious minds of the jurors? What thoughts were created and what was the effect? No matter how honest the jurors might be, the petitioner could never be satisfied.

It is an inherent right of the Court to grant a mistrial in the interest of justice, within sound discretion, taking all the circumstances into consideration so that the ends of justice would not be defeated.

It will be noted that in the Court's instructions to the jury in excusing them for the afternoon and until 10:30

on the following morning, there was no advice to refrain from reading newspaper articles concerning the case (46-49).

These objectionable articles and cartoons were far more defamatory and damaging than the articles in the case of *U. S.* v. *Montgomery, et al., supra.*

Inasmuch as no evidence had been taken at the time of the motion, it is the contention of the petitioner that the Court did not use sound discretion. The inconvenience of picking a jury from an other panel was a trivial matter concerning a couple of hours of the Court's time, in contrast to the probability of the petitioner being deprived of a fair and impartial trial.

It is further brought to this Honorable Court's attention, that after the motion to declare a mistrial was argued and decided in Chambers, the trial court immediately ascended the bench and started the trial. Even after the trial court saw the objectionable articles and scandalous cartoon, the trial court failed to caution, admonish or instruct the jury to disregard the objectionable articles and scurrilous cartoon.

The Court of Appeals is unequivocally mistaken when the said Court said in its opinion:

> "In the case at bar * * * Here the Court gave such a caution" (p. 165).

There was no such caution. It is impossible to see how the Court of Appeals came to that decision. The reading of newspapers was never mentioned in the admonition (46-49) and the sequence is followed by ascending the bench without ever mentioning newspapers and instructing the jury to disregard any opinions or impressions taken therefrom (69).

Experience and human understanding condemns the slightest interference with our judicial procedure. These objectionable articles and cartoons obstructed and interfered with the true administration of justice.

The petitioner moved for the mistrial because he thought the jury could not give him a fair and impartial trial, consciously or subconsciously. After this conviction herein petitioner is thoroughly convinced that he was right in the first instance.

As said by Mr. Justice Jackson in *Shepard* v. *Florida*, 341 U. S. 50 at page 51:

> "But prejudicial influences outside the courtroom becoming all too typical of a highly publicized trial were brought to bear on this jury with such force that the conclusion is inescapable that the defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and public opinion which it generated."

The petitioner did not receive a fair and impartial trial in accordance with the 6th Amendment of the Constitution of the United States.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

HOWARD W. AMELI,
Attorney for Petitioner.

JAMES F. RYAN,
with him on the Brief.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

LOUIS WEBER also known as LUIS WEBER,

Defendant-Appellant.

SIR:

PLEASE TAKE NOTICE, upon the annexed affidavit of James F. Ryan, attorney for above named Appellant, sworn to the 8th day of April 1952, the undersigned will move this Court at a Stated Term thereof to be held in Room 1705 of the United States Courthouse, Foley Square, New York City, N. Y., on the 14th day of April 1952 at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the United States Attorney for the Southern District of New York to furnish this Honorable Court with a copy of the Grand Jury Minutes, upon which this indictment was predicated, in order to properly decide whether the Appellant's constitutional rights have been violated, and for such other and further relief as to this Court may seem proper and just.

Dated, April 8, 1952.

Yours etc.,

JAMES F. RYAN,
Attorney for Appellant,
44 Court Street,
Brooklyn 2, N. Y.

To:

HON. MYLES J. LANE,
United States Attorney for the
Southern District of New York.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

LOUIS WEBER also known as LUIS WEBER,

Defendant-Appellant.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

JAMES F. RYAN being duly sworn, deposes and says:

That I am counsel for the Appellant in the above entitled action.

That Appellant has been convicted of the crime of perjury, and the appeal is now pending before this Court.

Appendix A

That Appellant has raised a question of the invasion of his constitutional rights in the method emeployed by the Government in obtaining an indictment against him in this case.

That heretofore and preceding the trial had herein, Appellant moved the trial court for an inspection of the Grand Jury minutes, and/or a dismissal of the indictment, upon the ground that the Grand Jury received insufficient evidence upon which the indictment was predicated.

The motion was denied and the Hon. Ruby M. Hulen, District Judge, wrote an opinion, the pertinent part being:

> "It is my opinion that the allegations of the motion in this case do not call for that action. The motion and the present procedure of the motion, in my opinion, is a fishing expedition."

That during the trial it was proved that only three out of 8 Government witnesses testified before the Grand Jury. Analyzing the testimony of the three witnesses, their evidence proved two elements of the crime of perjury, namely, the Appellant's statement and its falsity.

The Government failed to offer and prove any evidence on two other necessary elements of the crime of perjury namely, a competent tribunal with the power to administer an oath and the materiality of the false statement.

It is the belief of counsel, and supported to a great degree by the aforesaid development on trial, that the District Attorney has never submitted the transcript of the Grand Jury minutes to the said Hon. Ruby M. Hulen, District Judge. The opinion was based upon the form of the motion and not upon the actual testimony before the Grand Jury. In fact, it would not surprise counsel if the Grand

Jury minutes have not been typed, up to the preparation of this motion.

In view of the aforesaid developments on trial, a review of the evidence before the Grand Jury can no longer be called a fishing expedition.

An indictment based upon two or three elements of a crime when it is necessary to prove five elements of the crime, is an indictment predicated on utter insufficient evidence and found in violation of the Appellant's constitutional rights.

As Judge Sandborn said in *McKinney* v. *U. S.*, 195 F. 25, 31, discussing the 5th and 6th Amendments of the Constitution of the U. S.:

> "If therefore, his indictment was found without legal evidence and hence in violation of law, and the judgment against him is affirmed and executed, he will be deprived of his liberty and property without due process of law."

Counsel for the Appellant does not want to see the evidence before the Grand Jury, but counsel wants this Court to read the said evidence and determine whether the Appellant's constitutional rights have been violated.

In *U. S.* v. *Alper*, 156 F. 2nd, 222, 226 Judge Swan said:

> "After an indictment has been found and the accused apprehended, the veil of secrecy surrounding Grand Jury proceedings may safely be lifted, where justice so requires. * * * When the testimony before the Grand Jury is in small enough compass to make any contradiction between it and the witness' trial testimony readily discernible, it is a tolerable duty to impose upon the judge an examination of the minutes."

If the reading of the minutes under such circumstances is a tolerable duty, then the reading of the minutes to see whether the Appellant's constitutional rights have been violated is of greater importance.

WHEREFORE, Appellant prays for an order directing the District Attorney to furnish this Honorable Court with a copy of the Grand Jury minutes, in order to properly decide this question and further protect the constitutional rights of the Appellant.

JAMES F. RYAN

Sworn to before me this
8th day of April, 1952.

BETTY GAECKLE
Notary Public, State of New York
No. 24-6439900 Qual. in Kings County
Cert. Filed in Kings Co. Clk's & Reg. Off.
Commission expires March 30, 1954

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 236

LOUIS WEBER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 162-165) is reported at 197 F. 2d 237.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1952 (R. 166). By order dated July 3, 1952, Mr. Justice Jackson extended the time for filing a petition for certiorari to and including August 4, 1952 (R. 167). The petition

was filed on July 30, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion to deny petitioner's request for inspection of the grand jury minutes based on a claim that an indictment for perjury was not supported by adequate evidence of materiality or the competency of the tribunal.

2. Whether the materiality of the question on which the indictment was founded was properly proved by the testimony of the counsel for the committee before which petitioner testified.

3. Whether the trial court abused its discretion in refusing to grant a mistrial by reason of allegedly prejudicial newspaper articles published during trial.

STATUTE INVOLVED

18 U. S. C. 1621 (62 Stat. 773) provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter

which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of New York for perjury, in violation of 18 U. S. C. 1621, growing out of his testimony before a subcommittee of the Senate Special Committee to Investigate Organized Crime in Interstate Commerce (hereafter called the Kefauver Committee or the Committee). (R. 3-4). The jury returned a verdict of guilty (R. 123), and the court imposed a sentence of five years' imprisonment and a fine of $2,000 (R. 126). The judgment was unanimously affirmed by the Court of Appeals for the Second Circuit (R. 162-166).

The evidence may be summarized as follows:

On March 16, 1951, a subcommittee of the Kefauver Committee held a hearing in New York City for the purpose of gathering information about crime and corruption among public officials and law enforcement officers, and the relationship between crime and politics in New York and elsewhere (Gov. Exs. 3, 5, R. 42, 44; R. 47-50). Petitioner was called to give testimony in connection with the Committee's investigation of the relation-

ships and associations of James J. Moran, then Commissioner of Water Supply in New York City (R. 51), with various criminals, as well as persons holding high office in the City and State of New York. Petitioner's testimony was also sought in connection with an investigation of the numbers and policy rackets which the Committee was conducting in order to ascertain the extent to which the policy racket was dominated by large criminal syndicates. (R. 50-51.)

The text of the interchange forming the basis of the indictment is as follows (R. 3-4):

> Mr. Chairman: You told us you never did know Mr. Moran when you were here before. Here is Mr. Moran. Do you know him?
>
> Mr. Weber: No, sir.

At the trial, the Government produced four witnesses who had worked, at various times from 1946 to 1950, as receptionists in Mr. Moran's office. Their testimony disclosed, not only that petitioner knew James J. Moran, but that petitioner visited him and was escorted into his office a minimum of 84 times, each visit lasting for a period of 10 to 15 minutes (R. 73-75, 82-83, 86-87, 90-93).

Prior to trial, petitioner filed a motion to dismiss the indictment on the ground that the grand jury did not receive sufficient evidence upon which to return the indictment, or in the alternative, petitioner moved the trial court to inspect the grand

jury minutes (R. 5-10). This motion was denied (R. 152-156). On the second day of the trial, following the impaneling of the jury and prior to the calling of witnesses, petitioner moved the trial court, *in camera,* for the withdrawal of a juror and the declaration of a mistrial on the ground that unfavorable newspaper reports, published the night before, deprived him of a fair and impartial trial. This motion was denied by the trial court. (R. 19-20.) Thereafter, at the close of the Government's case petitioner sought to have the minutes of the grand jury marked for identification in order to include them in the record on appeal. This motion was denied. (R. 100.) Petitioner then renewed his motion to dismiss the indictment on the ground that there was insufficient evidence before the grand jury, and this was also denied by the trial court (R. 101). On appeal, the court below denied petitioner's motion for the production and inspection of the grand jury minutes (R. 164).

ARGUMENT

1. Petitioner contends that prejudicial error was committed in the instant case by the trial court's denial of his motions to dismiss the indictment on the grounds of the insufficiency of the evidence before the grand jury, and by the refusal of both the trial court and the Court of Appeals to inspect the grand jury minutes (Pet. 14-21). The essence of this argument is that since two of the trial witnesses (the Committee's chief counsel and

the official stenographer) admittedly did not testify before the grand jury, and that since these witnesses were the only persons who could testify with respect to (a) the materiality of petitioner's false testimony to the subject matter of the Committee's investigation, and (b) the competency of the Committee itself and its authority to administer an oath, "the finding of the Grand Jury was based on utterly insufficient evidence" (Pet. 15).

Other witnesses, however, such as members of the Committee itself or other members of the counsel staff, could have testified before the grand jury respecting both the issues of materiality and competency, and proof could have been made by documents as well. *United States* v. *Moran,* 194 F. 2d 623 (C.A. 2), certiorari denied, 343 U. S. 965; *Meyers* v. *United States,* 171 F. 2d 800, 812-814 (C.A.D.C.), certiorari denied, 336 U. S. 912.

The granting of an application for disclosure and inspection of evidence adduced before the grand jury is a matter within the exercise of the trial court's discretion. See Rule 6(e), F.R. Crim. P. The secrecy of the proceedings before the grand jury are not to be set aside on every request or suggestion of the person indicted, but only where there is probability of serious illegality. *United States* v. *Remington,* 191 F. 2d 246, 252 (C.A. 2); *United States* v. *Alper,* 156 F. 2d 222 (C.A. 2); *Shushan* v. *United States,* 117 F. 2d 110, 113 (C.A. 5), certiorari denied, 313 U. S. 574;

Schmidt v. *United States,* 115 F. 2d 394 (C.A. 6). And absent such a showing, the presumption that the indictment was found on sufficient evidence must prevail. See *United States* v. *Texeira,* 162 F. 2d 169, 170 (C.A. 2); *Mulloney* v. *United States,* 79 F. 2d 566, 580 (C.A. 1), certiorari denied, 296 U. S. 658; *Carroll* v. *United States,* 16 F. 2d 951 (C.A. 2).

As the court below aptly stated (R. 163):

> Such presumption is not overcome merely by showing that some of the trial witnesses did not appear before the grand jury, where the competency of the tribunal may have been otherwise established.

2. Rudolph Halley, Chief Counsel of the Committee, was permitted over objection to testify as to the subject matter under investigation by the Committee at the time petitioner was called as a witness (R. 48-50). In that connection he testified that petitioner was called because of the Committee's interest in the relationships of Moran, a high New York City official, and because the Committee, on the basis of "certain specific information, which never has become public, because the Committee did not obtain the proof which it could present," was "very anxious to question at length those people who were associated with the policy racket, in order to prove the information we had that the policy racket in New York is dominated

by the Mafia and by the large criminal syndicates" (R. 50-51).

Petitioner contends (Pet. 24-34) that it was error to permit Halley to testify, that without such testimony there was no proof of the materiality of the question on which the enactment was founded, and that, even if consideration is given to such testimony, the element of materiality was not sufficiently proved.

Halley's testimony, however, clearly established that petitioner was considered to have knowledge of the policy racket. The relationship between a city official and persons in the policy racket was a proper subject of investigation by the Committee which was authorized to investigate local conditions fostering the growth of criminal syndicates in connection with its study of the use of interstate facilities by organized crime (Senate Resolution 202, 81st Cong., 2d Sess., Gov. Ex. 3, R. 42; R. 138-141). The point was specifically decided in *United States* v. *Moran*, 194 F. 2d 623 (C.A. 2), certiorari denied, 343 U. S. 965, involving Moran's conviction for perjury in testifying before the same Committee that he had seen petitioner only two or three times.

Petitioner's objection to Halley's testimony is without foundation. The Government was under a duty to prove materiality, and it was at petitioner's insistence (R. 102-103, 107) that that issue was left to the jury instead of being before the

court alone. The fact that the relevant evidence on the issue of materiality showed that petitioner was believed to be involved in the policy racket does not render such evidence inadmissible. *United States* v. *Grayson,* 166 F. 2d 863, 867 (C.A. 2); *Luteran* v. *United States,* 93 F. 2d 395, 399 (C.A. 8), certiorari denied, 303 U. S. 644.

Nor is there any basis for the contention that Mr. Halley's testimony was not competent. As the Court of Appeals pointed out in the *Moran* case, *supra,* 194 F. 2d at p. 626, it was relevant to show "in concrete terms what the Committee was trying to do and the scope of its investigations." The issue as to which Halley was testifying was whether the Committee had reasonable ground for calling petitioner and asking him the question on which the indictment was founded. It is thus similar to the issue involved where the claim of entrapment is interposed, where the Government, to show probable cause for its action, may refer to hearsay testimony in its possession. *Heath* v. *United States,* 169 F. 2d 1007, 1010 (C.A. 10).

3. The trial court did not abuse its discretion in refusing to grant a mistrial by reason of allegedly prejudicial newspaper articles published during the trial. Petitioner does not assert that any of the jurors read the articles complained of, nor did he request that they be interrogated to ascertain whether they had (R. 19-23). See *United States* v. *Carruthers,* 152 F. 2d 512 (C.A. 7), certiorari

denied, 327 U.S. 787; *United States* v. *Keegan*, 141 F. 2d 248, 258 (C.A. 2), reversed on other grounds, 325 U.S. 478; *Klose* v. *United States*, 49 F. 2d 177, 182 (C.A. 8), certiorari denied, 284 U.S. 626. And even if the jury had read the articles, it still would have been a matter for the trial court's discretion as to whether a mistrial should be declared *Holt* v. *United States*, 218 U.S. 245, 250-251; *United States* v. *Hirsch*, 74 F. 2d 215, 218-219 (C.A. 2), certiorari denied, 295 U.S. 739; *Myers* v. *United States*, 223 Fed. 919, 923-924 (C.A. 2), certiorari denied, 242 U.S. 627.

The record clearly established that the trial court issued frequent cautionary instructions to the jury (R. 16, 67, 94, 105), the court stating at one point (R. 67):

> It has come to my attention that some of the newspapers are publishing articles about the evidence and about this defendant and going outside the record. So I ask you not to consider anything the newspapers might say because you are sworn jurors and are to be guided entirely by the sworn evidence given on the witness stand and the law which the Judge will give you. So dispossess your mind of any outside statements or influence of any kind and be guided solely by the evidence given under oath.

Later, the court delivered petitioner's requested charge that "any information obtained by you from sources other than the evidence introduced at this trial, must not be considered by you in reaching your verdict" (R. 117). The court further charged the jury that they should render a verdict "based alone on the evidence and these instructions, and free from influence, bias, prejudice, or sympathy" (R. 115).

Accordingly, in view of these instructions and the lack of any showing of influence or prejudice, there was no abuse of the trial court's discretion in denying petitioner's motion for a mistrial. See, *United States* v. *Leviton,* 193 F. 2d 848, 857 (C.A. 2), certiorari denied, 343 U.S. 946.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

BEATRICE ROSENBERG,
JAMES T. KELLS,
Attorneys.

SEPTEMBER 1952.

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